SERVED: June 18, 1993

NTSB Order No. EA-3908

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 7th day of June, 1993

JOSEPH M. DEL BALZO, Acting Administrator, Federal Aviation Administration, Complainant, v. ROBERT P. KRINGS, Respondent.	Docket SE-11582

OPINION AND ORDER

Respondent has appealed from the oral initial decision issued by Administrative Law Judge Joyce Capps at the conclusion of an evidentiary hearing held on July 11, 1991.[1] By that decision, the law judge affirmed the Administrator's order revoking respondent's airman medical certificate and suspending his airman pilot certificate for 60 days based on allegations

[1] Attached is an excerpt from the hearing transcript containing the oral initial decision.

that his failure to disclose a 1984 conviction for driving while intoxicated (DWI) on five subsequent applications for airman medical certification constituted intentionally false statements, in violation of 14 C.F.R. 67.20(a)(1).[2] For the reasons discussed below, we deny the appeal.

In May, 1984, respondent pled guilty to a DWI charge and, after undergoing a court-ordered alcohol evaluation, was sentenced in July of that year to two years of probation.[3] (Exhibit A-3, p. 2-3; Tr. 11.) As a term of respondent's probation, his driver's license was also suspended for 60 days.[4] (Exhibit A-3, p. 3; Tr. 46.) In September, 1984, respondent filled out his first application for an airman medical certificate. In response to question 21v. in the Medical History section of the form, which asks whether the applicant has ever had or currently has a "record of traffic convictions," respondent checked "yes" and indicated under "remarks" that he had received a speeding ticket in February of that year.

---

[2] Section 67.20(a)(1) provides as follows:

§ 67.20 Applications, certificates, logbooks, reports, and records: Falsification, reproduction, or alteration.

(a) No person may make or cause to be made --
(1) Any fraudulent or intentionally false statement on any application for a medical certificate under this part.

[3] Respondent's application for early termination of his probation was granted on October 4, 1985, thus excusing respondent from serving the last nine months of his two-year probation sentence. (See Exhibit A-3, p. 5.)

[4] We consider the law judge's mischaracterization of this 60-day suspension as a six-month revocation of driving privileges (Tr. 60) to be harmless error.

Respondent made no mention on that application of his DWI conviction just two months earlier. (Exhibit A-1, p. 9.) Nor did respondent disclose that conviction on his subsequent applications for airman medical certification in 1986, 1987, 1988, and 1989. (Exhibits A-1 and A-2.)[5]

Respondent maintained at the hearing that he did not believe being sentenced to two years probation as a result of his guilty plea to the DWI charge constituted a "conviction" and that, therefore, his answers on the medical applications were true to the best of his knowledge at the time. (Tr. 11, 35, 41.) Furthermore, in light of his asserted belief that the court-ordered probation would be expunged from his record after completion, respondent stated that he was unsure whether he had a "record" at all. (Tr. 35, 37.)

In affirming the Administrator's order, the law judge declined to adopt the court's analysis in United States v. Manapat, 928 F.2d 1097 (11th Cir. 1991) (holding that the question here at issue is so fundamentally ambiguous as to preclude a conviction under 18 U.S.C. § 1001 as a matter of law), as urged by respondent. She stated "we're dealing with a guy with two years of college and can read. I don't care what has been going on as far as the Manapat case is concerned, that form

[5] Respondent again listed the February, 1984, speeding ticket on his 1988 and 1989 applications, but did not mention it on his 1986 and 1987 applications. He testified that, until the aviation medical examiner explained it to him at his 1986 medical exam, he did not realize that the application sought to elicit even information he had disclosed on prior applications. (Tr. 21.)

is as clear as a bell." (Tr. 60-1.) The law judge went on to reject respondent's explanation as to why he failed to disclose his DWI conviction, finding that he "knew . . . that he was pleading guilty to a violation" and he "knew that when he answered this form he had not been truthful." (Tr. 62-3.)

On appeal, respondent argues that the Administrator presented insufficient evidence of materiality and knowledge,[6] and that the law judge erred in not granting his motion to dismiss (incorrectly termed a "motion for directed verdict" by respondent) at the conclusion of the Administrator's case in chief. He also argues that the initial decision should be reversed because, in his view, the law judge failed to consider respondent's unrebutted testimony as to why he did not disclose the DWI incident on his medical applications, and ignored the materiality and knowledge elements of the falsification charge. Finally, respondent asserts that the law judge improperly disregarded the Manapat decision, which respondent characterizes as "binding appellate precedent."

Upon review of the entire record in this case, we have concluded that the Administrator presented sufficient evidence to establish all three elements of the falsification offense, and that a preponderance of the evidence in the record as a whole supports the law judge's finding of intentional falsification.

---

[6] The elements of intentional falsification are 1) a false statement, 2) in reference to a material fact, 3) made with knowledge of its falsity. Hart v. McLucas, 535 F.2d 516, 519 (9th Cir. 1976).

Respondent pled guilty to a criminal offense of DWI, was adjudged guilty of the charge, and was sentenced to two years probation. (Exhibit A-3.) This constitutes a DWI conviction. His failure to disclose this conviction on medical applications which asked whether he had a record of traffic convictions constitutes circumstantial proof of intent to falsify. See Administrator v. Juliao, NTSB Order No. EA-3087 (1990) (if law judge rejects respondent's explanation of false answers, medical application with incorrect answers constitutes circumstantial proof of intent to falsify).[7] Although the Administrator did not present evidence as to the materiality of this information, we think its materiality is established by virtue of the fact that it was specifically sought in a form used by the Administrator to determine an applicant's qualifications to hold an airman medical certificate.[8]

Thus, by introducing into evidence the court records documenting the DWI conviction (Exhibit A-3), and respondent's

[7] It is well-established that knowledge of falsity may be inferred from circumstantial evidence. Erickson v. NTSB, 758 F.2d 285 (8th Cir. 1985); Administrator v. Monaco, NTSB Order No. EA-2835 (1988); Administrator v. Juliao, NTSB Order No. EA-3087 (1990).

[8] A material statement is one which has a natural tendency to influence, or is capable of influencing, a decision of the agency in making a required determination. Twomey v. NTSB, 821 F.2d 63 (1st Cir. 1987). See also Administrator v. Johnson, NTSB Order No. EA-2844 (1988) (by omitting mention of a drug conviction respondent effectively concealed information which was capable of influencing FAA's review of his qualifications - materiality of the conviction is not defeated because the Administrator has discretion to determine that some convictions should have no impact on the certification decision.)

medical applications showing that he did not disclose this conviction (Exhibits A-1 and A-2), the Administrator presented prima facie evidence that respondent made false statements as to a material fact with knowledge of their falsity. Respondent attempted to rebut the Administrator's evidence by asserting that he did not know he had been convicted of DWI and thus did not know he was making a false statement. Contrary to respondent's assertion in his brief, the law judge did not ignore or fail to consider this testimony, but simply rejected it as incredible. (Tr. 62-3.) Because respondent has not shown that credibility determination to be arbitrary or capricious, it is not subject to reversal. Administrator v. Smith, 5 NTSB 1560, 1563 (1986). Accordingly, since respondent failed to rebut the Administrator's prima facie case, a preponderance of the evidence in the record as a whole supports the law judge's initial decision.

Contrary to respondent's assertion, a finding of intentional falsification in this case is not inconsistent with our decision in Administrator v. Juliao, NTSB Order No. EA-3087, where we emphasized the need for proof (either direct or circumstantial) of actual knowledge of falsity. In Juliao, the law judge essentially found the respondent "should have known" he was making a false statement, and failed to make any finding as to the credibility of respondent's testimony that he did not read the questions on the medical application and, therefore, did not know he was answering falsely.[9] The instant case is different

[9] We recognize that in ruling on respondent's motion to

from Juliao in that the law judge clearly rejected respondent's explanation as incredible and made an explicit finding that respondent knew his answers were not truthful.

As for respondent's final argument, we have previously addressed the applicability of the Manapat decision to the Board's proceedings. In Administrator v. Barghelame and Sue, NTSB Order No. EA-3430 (1991), we indicated our disagreement with the Manapat majority's position, and indicated that in our view the questions relating to traffic convictions and other convictions are not confusing to persons of ordinary intelligence. We further stated that we do not consider the holding in Manapat to be controlling in our certificate proceedings,[10] and we will continue to rely on our law judge's determinations as to whether a particular respondent's false answer in response to those questions was deliberate or intended to deceive. Moreover, contrary to respondent's suggestion in his brief, the fact that the FAA has amended the application does not prove that the prior language or format was flawed in its

(..continued)
dismiss the law judge suggested that respondent "knew or should have known" that he had a record of traffic convictions. (Tr. 9.) However, it is clear from her initial decision that she found respondent had actual knowledge of his false statements. (Tr. 61-3.) Accordingly, because the law judge ultimately applied the correct legal standard, to the extent that her earlier comment could be considered a misstatement of that standard we consider the error harmless.

[10] Indeed, the Manapat majority acknowledges that its holding in that (criminal) case "does not preclude the government from refusing to grant a certificate, or from revoking a certificate already granted, if the applicant falsely responds to the government's requests for information." Manapat at 1102.

application to respondent. See Administrator v. Booth, NTSB Order No. EA-3688 at 6 (1992) (FAA's amendment of question regarding substance abuse does not prove that prior language was flawed in its application to respondent.)

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and

2. The revocation of respondent airman medical certificate and the 60-day suspension of respondent's airman pilot certificate shall commence 30 days after the service of this opinion and order.[11]

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

[11] For the purpose of this opinion and order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).